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In the
Supreme Court of the United States
October Term, 2007

EUGENE MONGEAU, *Petitioner*,
v.
CITY OF MARLBOROUGH *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, MASSACHUSETTS CHAPTER, IN SUPPORT OF PETITIONER

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November 21, 2007

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MOTION OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, MASSACHUSETTS CHAPTER, FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

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Pursuant to Supreme Court Rule 37.2 (a), counsel for Amici Curiae New England Legal Foundation ("NELF") and National Association of Industrial and Office Properties, Massachusetts Chapter ("NAIOP") have attempted to secure written consent for the filing of the attached Brief of Amici Curiae from counsel for the Petitioner and Respondents.[1] Although counsel for the petitioner granted such consent, counsel for the respondents did not assent to the request of Amici for written consent pursuant to Supreme Court Rule 37.2 (a). Accordingly, counsel for Amici Curiae hereby move this Court pursuant to Supreme Court Rule 37.2 (b) for leave to file the Brief of Amici Curiae that is submitted herewith. Amici base this motion on the grounds set forth below.

NELF and NAIOP seek to bring to the Court's attention their views, and those of their members, concerning the appropriate standard for review of government conduct in regard to land-use determinations challenged as violations of the substantive due process protections of the Fifth and Fourteenth Amendments to the United States

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1 Pursuant to Supreme Court Rule 37.6, counsel for Amici state that no counsel for a party authored the accompanying Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the accompanying Brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to the Brief's preparation or submission. Pursuant to Supreme Court Rule 37.2 (a), counsel for Amici state that Counsel of Record for all parties received notice at least ten days prior to the due date of Amici Curiae's intention to file this Brief.

Constitution.

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses from all parts of New England and the United States.

NELF's members are affected by the business climate in New England and nationwide. Furthermore, some of NELF's members are directly interested in issues related to real estate development and use because they are involved in developing, owning, managing, insuring, and/or financing real property. A healthy real estate industry is a necessary condition of a vibrant economy and requires that developers be provided with appropriate remedies when governmental decision makers abuse their authority and render biased decisions.

NELF has regularly appeared in state and federal courts, as a party, amicus curiae, or counsel, in cases raising issues of general economic significance to the New England and national business communities.[2]

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[2] *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007); *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007); *Rapanos v. United States*, 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 126 S. Ct. 1843 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil*

This is such a case and Amici Curiae believe that this Brief provides an additional perspective which may aid the Court in determining whether to grant the petitioner's application for a writ of certiorari.

The written consent of counsel for the petitioner to the submission of the accompanying Brief of Amici Curiae pursuant to Supreme Court Rule 37.2 (a) has been submitted together with the accompanying Brief to the Clerk of this Court. On November 1, 2007, counsel for Amici contacted Judy Levenson, Esq., counsel for the respondents, and requested written assent for Amici to submit the accompanying Brief pursuant to Supreme Court Rule 37.2 (a). Counsel for the respondents indicated by email on November 6, 2007, that she would not be able to consent to the filing of the accompanying Brief.

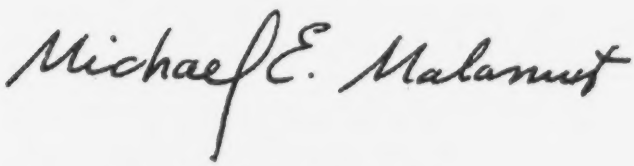
Wherefore, NELF and NAIOP respectfully request that this Court grant Amici Curiae leave to file the accompanying Brief in support of the Petition for a Writ of Certiorari.

Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005); *Commissioner v. Banks*, 543 U.S. 426 (2005).

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION and NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, MASSACHUSETTS CHAPTER,

By their attorneys,



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November 21, 2007

QUESTION PRESENTED

When it is alleged that a local official denied a land-use permit without any health, safety, or welfare justification, is the standard for determining whether the decision violates substantive due process a "shocks the conscience" test, as the First and Third Circuits hold, or a rational basis analysis, as applied in the Second, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits?

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INTEREST OF AMICI CURIAE

Amici Curiae New England Legal Foundation ("NELF") and National Association of Industrial and Office Properties, Massachusetts Chapter ("NAIOP") seek to bring to the Court's attention their views, and those of their members, concerning the appropriate standard for review of government conduct in regard to land-use determinations challenged as violations of the substantive due process protections of the Fifth and Fourteenth Amendments to the United States Constitution.[1]

1 Pursuant to Supreme Court Rule 37.6, counsel for Amici state that no counsel for a party authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to the Brief's preparation or submission.

NAIOP is an association of over 1300 professionals and organizations in Massachusetts with an interest in the responsible ownership, development, management, and financing of properties throughout the Commonwealth. Established in 1978, NAOIP provides educational, networking and business development opportunities for all real-estate-related professionals and represents the industry through its effective public affairs advocacy.

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses from all parts of New England and the United States.

NELF's members are affected by the business climate in New England and nationwide. Furthermore, some of NELF's members are directly interested in issues related to real estate development and use because they are involved in developing, owning, managing, insuring, and/or financing real property. A

Pursuant to Supreme Court Rule 37.2 (a), counsel for Amici state that Counsel of Record for all parties received notice at least ten days prior to the due date of Amici Curiae's intention to file this Brief. Counsel for the petitioner consented to its filing, while counsel for Respondent withheld assent. Pursuant to Supreme Court Rule 37.2 (b), counsel for Amici Curiae have moved for leave to file this Brief, which motion is bound herewith.

healthy real estate industry is a necessary condition of a vibrant economy and requires that developers be provided with appropriate remedies when governmental decision makers abuse their authority and render biased decisions.

NELF has regularly appeared in state and federal courts, as a party, amicus curiae, or counsel, in cases raising issues of general economic significance to the New England and national business communities.[2] This is such a case and Amici Curiae believe that this Brief provides an additional perspective which may aid the Court in determining whether to grant the petitioner's application for a writ of certiorari.

STATEMENT OF THE CASE

Amici Curiae adopt the Statement of the Case contained in the Brief of Petitioner Eugene Mongeau.

SUMMARY OF ARGUMENT

The United States Courts of Appeals for the First and Third Circuits—by requiring proof of government conduct that "shocks the conscience" in order for a property developer to prevail on a land-use-related substantive due process claim—imposes an impermissibly high standard on those seeking redress

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[2] *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007); *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007); *Rapanos v. United States*, 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 126 S. Ct. 1843 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Commissioner v. Banks*, 543 U.S. 426 (2005).

from the courts for civil rights violations. As the petitioner argues, the First and Third Circuits' standard conflicts with that adopted by a majority of the federal Courts of Appeals. Additionally, Amici argue that review is warranted because the First and Third Circuits' minority standard also conflicts with that utilized by many state courts, including state courts within those circuits, when considering federal civil rights violations. This conflict allows forum shopping between state and federal courts in the same area and runs contrary to the fair administration of justice. Moreover, the test adopted by the First and Third Circuits contravenes this Court's substantive due process jurisprudence in land-use cases.

ARGUMENT

I. Certiorari is warranted because of the conflict over the appropriate standard of review for substantive due process claims between that adopted by the Courts of Appeals for the First and Third Circuits and those adopted by state courts within their geographical areas.

Respondent, the City of Marlborough, Massachusetts, (the "City") allegedly violated the rights of Petitioner Eugene Mongeau ("Mongeau") to due process under the Fifth and Fourteenth Amendments to the United States Constitution[3]

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3 The Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The Fourteenth Amendment states: "[N]or shall any state

through the actions of Respondent Commissioner of Inspectional Services Steven Reid ("Reid"). Mongeau alleges that Reid, biased against Mongeau for refusing to make a voluntary payment in exchange for permission to build, treated Mongeau's building permit application and site permit review in a hostile and cavalier manner. This allegedly caused delays that resulted in expiration of permits outside Reid's control before Mongeau could commence building, despite an eminent domain settlement between Mongeau and the City granting Mongeau authority to build. *Mongeau v. City of Marlborough,* 492 F.3d 14, 15–16 (1st Cir. 2007).

The plain wording of the due process clauses of the United States Constitution grants significant protection to property, as well as life and liberty. U.S. Const. amend. V, amend. XIV. Substantive due process protects the interests of life, liberty, and property when the requisite process is followed but the decisions are biased. Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights,* 103 Colum. L. Rev. 833, 836–39 (2003). Substantive due process is the chief means to protect real property owners from bad faith land-use decisions. *Lingle v. Chevron USA, Inc.,* 544 U.S. 528, 540–41 (2005).

As the petitioner explains, Petition at 10–17, the federal circuits are divided about the nature of the hurdle a landowner or developer must overcome in

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deprive any person of life, liberty, or property, without due process of law."

order to succeed on a substantive due process claim in the land-use context. The United States Courts of Appeals for the First Circuit (as in the case below) and Third Circuit adopt the onerous "shocks the conscience" standard derived from the law regarding arrest and detention of prisoners as developed in *County of Sacramento v. Lewis,* 523 U.S. 833 (1998), and *Rochin v. California,* 342 U.S. 165 (1952). *See Mongeau,* 492 F.3d at 17; *Eichenlaub v. Township of Indiana,* 385 F.3d 284 (3d Cir. 2004); *United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392, 399 (3d Cir. 2003); *PFZ Props. v. Rodriguez,* 928 F.2d 28, 31 (1st Cir. 1991).

Other federal courts distinguish *Lewis* as applicable to substantive due process claims only in the context of criminal arrest and detention or, more specifically, high-speed police chases, the fact scenario at issue in *Lewis. See, e.g., Khan v. Gallitano,* 180 F.3d 829 (7th Cir. 1999). As is detailed in the Petition, the majority of United States Courts of Appeals—the Second, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits—utilize a standard highly deferential to governmental actors but permitting challenges based on provable claims of bias and misconduct, unlike the "shocks the conscience" test. *See Equity Lifestyle Props., Inc. v. County of San Luis Obispo,* 2007 WL 2694667 at *8 (9th Cir. Sept. 17, 2007) (rational basis); *O'Mara v. Town of Wappinger,* 485 F.3d 693, 700 (2d Cir. 2007) ("arbitrary and irrational" conduct); *Mikeska v. City of Galveston,* 451 F.3d 376, 378 (5th Cir. 2006) (rational basis); *Tri-County Paving, Inc. v. Ashe County,* 281 F.3d 430, 440 (4th Cir. 2002) ("arbitrary or

irrational" conduct); *Brody v. City of Mason,* 250 F.3d 432, 438 (6th Cir. 2001) ("arbitrary and capricious" conduct); *Centres, Inc. v. Town of Brookfield,* 148 F.3d 699, 704 (7th Cir. 1998) ("arbitrary and unreasonable" conduct).

Not only is there a division among the federal Courts of Appeals, but there is also a division between the First and Third Circuit Courts of Appeals, on the one hand, and state courts within their geographic areas, on the other. This is significant because state courts have co-equal original jurisdiction with federal courts in regard to federally based civil rights violations brought pursuant to 42 U.S.C. § 1983. *Martinez v. California,* 444 U.S. 277, 283 n.7 (1980). Conflict between state courts of last resort and federal Courts of Appeals in regard to an important question of federal law is a well recognized basis for granting a writ of certiorari. U.S. Sup. Ct. R. 10 (a). It is especially important in a case such as this where the state courts within the geographic area of a federal circuit differ from that circuit's federal courts, leading to the possibility of disparate results for the same event depending on where suit is brought.

In this case the First and Third Circuits' "shocks the conscience" standard for land-use-related substantive due process claims conflicts with the standards imposed by a number of state courts of last resort within the geographic territory associated with the two circuits. For example, within the First Circuit, Maine and Rhode Island review such claims under the "arbitrary and capricious" standard. *See, e.g., Kittery Retain Ventures, LLC v. Town of Kittery,* 856 A.2d

1183, 1193, 2004 ME 65, at ¶ 32, *cert. denied,* 544 U.S. 906 (2005); *Brunelle v. Town of South Kingstown,* 700 A.2d 1075, 1083–84 (R.I. 1997) ("arbitrary and capricious"). New Hampshire uses the "rational basis" standard. *Boulders at Stratford, LLC v. Town of Strafford,* 133 N.H. 633, 637, 903 A.2d 1021, 1026 (2006). Massachusetts uses "rational basis" jurisprudence, inquiring into whether the conduct was "arbitrary or unreasonable." *Zuckerman v. Hadley,* 442 Mass. 511, 516, 813 N.E.2d 843, 848 (2004) (rational basis); *Johnson v. Edgartown,* 425 Mass. 117, 121, 680 N.E.2d 37, 40 (1997). Puerto Rico uses "rational basis" review for claims arising out of government actions in civil matters. *See Collazo v. Commonwealth of Puerto Rico,* 1993 P.R. Offic. Trans. 839, 857, 134 P.R. Dec. 28, at § III (C). In other words, all states within the First Circuit use a more lenient standard for determining the validity of land-use-related federal substantive due process claims than the First Circuit's "shocks the conscience" test.

Within the Third Circuit, the Pennsylvania state courts appear to use a rational basis standard, asking whether the challenged conduct is "arbitrary and unreasonable and ha[s] no substantial relationship to promoting the public health, safety and welfare." *McGonigle v. Lower Heidelberg Township Zoning Hearing Bd.,* 858 A.2d 663, 668 (Pa. Commw. 2004) (citing *Boundary Drive Assoc. v. Shrewsbury Township Bd. of Supervisors,* 507 Pa. 481, 489–91, 491 A.2d 86, 90 (1985)). The New Jersey and Delaware courts, on the other hand, have followed *United Artists* and applied the Third Circuit's "shocks the conscience" test.

See Salem Church (Delaware) Assocs. v. New Castle County, No. Civ.A. 20305-NC, 2006 WL 2873745, at *13 n.113 (Del. Ch. Oct. 6, 2006); *Plemmons v. Blue Chip Ins. Servs., Inc.,* 387 N.J. Super. 551, 568–69, 904 A.2d 825, 836 (App. Div. 2003).

This divergence between state and federal courts covering the same geographical area can create injustice, uncertainty, and gamesmanship, all detrimental to property owners and developers as well as government land-use regulators seeking certainty as to the level of scrutiny of their conduct. Given its magnitude and significance, this is a conflict requiring resolution by the Court.

II. The "shocks the conscience" test adopted by the Courts of Appeals for the First and Third Circuits contravenes this Court's substantive due process jurisprudence regarding land-use-related claims.

The First and Third Circuits' "shock the conscience" test is inconsistent with this Court's own guidance. The less onerous, but still highly deferential, arbitrary conduct standard has the imprimatur of this Court's precedent in the land-use area. Thus, as is discussed in greater detail in the Petition at 18–21, the seminal substantive due process land-use decision by this Court overturned a local zoning determination on the ground that it was arbitrary and bore no relation to a proper governmental purpose. *Nectow v. City of Cambridge,* 277 U.S. 183, 187 (1928).[4] *See* Brian W.

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4 A court may set aside a land-use decision that "'has no foundation in reason and is a mere arbitrary or irrational exercise

Blaesser, *Substantive Due Process Protection at the Outer Margins of Municipal Behavior,* 3 WASH. U. J.L. & POL'Y 583, 585 (2000).[5]

In this day and age, many land-use decisions involve considerable discretion on the part of local administrative decision makers.

> [M]any local governments are currently attempting to address increasingly complex, sometimes subjective issues—preservation of "community character," urban design, "cumulative impacts" of land uses, growth control, environmental protection, affordable housing and infrastructure needs—through discretionary regulation . . . .

Blaesser, 3 WASH. U. J.L. & POL'Y at 600. *See id.* at 584. The infusion of considerable discretion into regulatory determinations allows a considerable role for "improper motives such as personal animus,

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of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'" *Nectow,* 277 U.S. at 187–88 (quoting *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395 (1926)).

5 The right not to be subject to arbitrary or capricious action by a governmental, legislative, or administrative action is a substantive due process right. In the case of irrational or wrongful land use regulatory decisions that may not amount to a taking, landowners and developers have relied on substantive due process claims in federal court as an important means to remedy such action.

Blaesser, 3 WASH. U. J.L. & POL'Y at 585.

political bias, or conflicts of interest" in the decision making process. *Id.*

Where it occurs, such improperly motivated, bad-faith conduct obviously harms property owners and discourages real estate investment. Property owners harmed by such conduct should be able to challenge it as arbitrary or irrational in order to obtain redress for and deter bad-faith bureaucratic determinations.

Scholarly analysis has been sharply critical of the Third Circuit's recent adoption of the "shocks the conscience" test in land-use cases as contrary to established precedent and basic fairness. *See* Clifford B. Levine & L. Jason Blake, *United Artists: Reviewing the Conscience Shocking Test under Section 1983,* 1 Seton Hall. Cir. Rev. 101, 117 (2005);[6] Shari K. Gekoski, Circuit Review, *Local Governments that*

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6 If the "shocks the conscience" test is construed to create a more stringent test, permitting arbitrary government conduct to proceed unchecked unless the conduct is deemed "conscience shocking," the new test may be challenged as being inconsistent with the historically stated principles of substantive due process protection. . . . [A] deliberate decision indifferent to the law by a governmental official sworn to uphold the law should constitute "an arbitrary exercise of the powers of government" and thus violate the Due Process Clause regardless of the fact that it may not be "conscience shocking" because people have become desensitized to corrupt and/or arbitrary government action.

Levine & Blake, 1 Seton Hall. Cir. Rev. at 117–18.

Purposely Delay Land Use Projects: What Law Applies3 49 Vill. L. Rev. 957, 979 (2004);[7] Parna A. Mehrbani, Comment, *Substantive Due Process Claims in the Land-Use Context: The Need for a Simple and Intelligent Standard of Review,* 35 Envtl. L. 209, 240 (2005).[8]

Only if arbitrary governmental action is held up to scrutiny will government officials have meaningful

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7 The Third Circuit should have followed its long history of applying the improper motive test . . . . [I]f land owners and developers are victims of substantive due process violations by local government officials, even the most improper behavior may not be enough to satisfy the new requirement by the Third Circuit. . . . Instead of defaulting to its own precedent, the Third Circuit relied on the Supreme Court's decision in *Lewis,* a case that was radically different and did not squarely address the issue of substantive due process in a land use context. As a result, there is confusion not only within the Third Circuit, but also in the district court as to what law applies.

Gekoski, 49 Vill. L. Rev. at 978–79 (footnotes omitted).

8 If the federal government refuses to act as a check on local government, the potential for imbalanced and inappropriate decision making could be just as harmful as the potential for a lenient standard of review to allow a flood of disappointed landowners into federal court. It is better to be overly cautious and overly protective of the inalienable right of property ownership.

Mehrbani, 35 Envtl. L. at 240. *See id.* at 240–41 (suggesting scrutiny of local governmental authorities' land-use determinations for arbitrary and unreasonable conduct).

standards to live up to in keeping with the highest traditions of public service. Moreover, unless arbitrary conduct is reviewable as a substantive due process violation, property owners will effectively have no recourse against bad faith conduct by government actors during land-use proceedings, as "even the most improper behavior may not be enough" to satisfy the First and Third Circuits' standard. Gekoski, 49 Vill. L. Rev. at 979. With a "shocks the conscience" test, citizens will become more and more inured to arbitrary and self-indulgent behavior by local officials as such conduct, without scrutiny, becomes more routine. "Ironically, the more nefarious a government's reputation, the more immune it may be from challenge." Levine & Blake, 1 Seton Hall. Cir. Rev. at 118 n.100. Unless this Court reinforces its jurisprudence in *Nectow* treating arbitrary and irrational local government action as a violation of substantive due process, arbitrary regulatory conduct may cause a vicious downward cycle of expectations for governmental behavior.

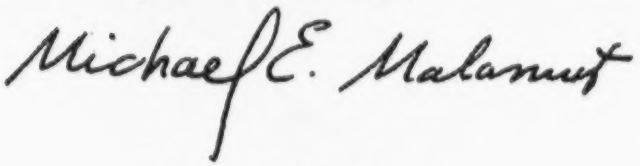
CONCLUSION

For the reasons stated above, this Court should grant the petition of Petitioner Eugene Mongeau for a writ of certiorari.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION and NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, MASSACHUSETTS CHAPTER,

By their attorneys,



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